COKE & COAL PRODUCTS (M) SDN BHD *a*

v.

HON SWEE KONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
CHIN FOOK YEN J
[SP NO: 24-612-93]
20 SEPTEMBER 1999

LAND LAW: *Caveat - Removal of - Compensation for wrongful entry - Whether actual loss or damage suffered - Whether complaint must show loss of own money or loss of use of own money - Whether must have mitigated loss - National Land Code 1965, s. 329* *c*

This was an appeal by the 4th defendant against the decision of the senior assistant registrar ('the SAR') allowing damages pursuant to s. 329 of the National Land Code 1965 ('the NLC') at RM205,600 consequent upon the removal of the defendants' caveat from the plaintiff's land. The issue before the court was whether there was evidence of actual damage suffered by the plaintiff. *d*

Held: *e*

[1] The award made was not for property value loss, as there was no sale involved, but for the amount of interest that would have accrued on the principal sum of RM2.57 million at the rate mentioned. The SAR was of the view that if the said loan facility had not been withdrawn, the plaintiff would have earned interest therefrom. The decision of the SAR was erroneous because the said loan was not the plaintiff's own money. If the plaintiff had made use of it, it would have to pay interest therefor. In other words, by not having to use the money, no interest was payable therefor and there would be no loss incurred. *f*

g

[2] To sustain a claim, the complainant must show that either he has thereby incurred a loss of his own money or that he has lost thereby the use of his own money. In the present case, even if the loss of interest was actual loss as contemplated by s. 329 of the NLC, the plaintiff would still not be entitled to the claim as it had failed to mitigate its loss. *h*

[Appeal allowed; SAR's decision set aside.]

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Case(s) referred to:

Ceda Nominees Pty Ltd v. Registrar of Titles and Crompton Nominees Pty Ltd [1982] ANZ Conv Rep 524 ***(refd)***

Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd [1981] 1 CLJ 91 ***(refd)***

Downie v. Kenny [1986] NSW Cony Rep 255-270 ***(refd)***

Lim Seng Hee & Anor v. Lee Tuan Wen & Anor [1973] 1 MLJ 153 ***(refd)***

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] 1 MLJ 336 ***(refd)***

Nelson v. Kimberley Homes Pty Ltd (Supreme Court of New South Wales, 20 April 1988) ***(refd)***

Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi Mookan & Anor; Dekor Panel Emas Sdn Bhd (Intervener) [1994] 3 CLJ 265 ***(refd)***

Legislation referred to:

National Land Code 1965, s. 329(1)

Other source(s) referred to:

Caveats Against Dealings, Shannon Lindsay, The Federation Press

For the plaintiff - Wong Kim Fatt (SH Au with him); M/s Ong & Co
For the defendants - S Muker; M/s Muker & Assoc

Reported by Farah Naim

JUDGMENT

Chin Fook Yen J:

This is an appeal by the 4th defendant from the decision of the Sr. Assist. Registrar (SAR) in allowing damages at RM205,600 consequent upon the removal of the defendants' caveat from the plaintiffs' pieces of land.

Briefly the facts are as follows. A company known as Chern Sing Furniture Sdn Bhd (company) was the registered proprietor of three pieces of land (the said lands). The 4th defendant was one of the directors, while the other defendants were the other directors in the company. On 26 December 1989 the DCB Bank Bhd, pursuant to a debenture executed by the company, appointed receivers and managers of the company. After the appointment, the receivers and managers on 23 August 1990, as vendors, entered into a sale and purchase agreement with the plaintiffs as purchasers over the said lands for the purchase price of RM2.57m. On knowing the sale, the defendants, including the 4th defendant, caused a caveat to be lodged against the said lands on 16 October 1990. The court subsequently ordered the removal of the caveat with damages to be assessed by the SAR and when so assessed be paid by the defendants to the plaintiffs. There was no appeal against the setting aside order. Accordingly the SAR proceeded with an enquiry to assess the damages suffered by the plaintiffs pursuant to s. 329 of the National Land Code (NLC).

At the enquiry held the plaintiffs produced evidence to prove the damages suffered. The evidence relevant to this discussion may be briefly stated below. It was common ground that the purchase price of RM2.57m was fully paid by plaintiffs on 23 August 1990, the caveat being lodged later on 16 October 1990. Subsequently on 26 November 1990 plaintiffs were approved a loan facility from the Malaysian French Bank Bhd (MFBB). According to plaintiffs, they needed the sum of RM2.57m from MFBB so as to plough back and use their working capital to carry on with their business. The plaintiffs also produced documentary evidence to show that they had existing contracts to supply goods to their customers. However, due to the presence of the caveat MFBB withdrew the said loan facility. The plaintiffs complained that as a result of MFBB's withdrawal they ran out of the working capital to buy supplies for onwards delivery to their customers. They stopped their supplies. Hence the loss of profits which they could have made, if they had been able to make use of the loan facility as the working capital. The SAR after having heard the evidence and the submissions on both sides assessed the damages at RM205,600. From the assessment of damages made by the SAR it would appear that the claim of damages presented by plaintiff fell into two headings. The first would be the amount of interest the plaintiffs would have earned on the amount of the loan of RM2.57m had it not being withdrawn and it was so assessed at RM205,600 and the second being the loss of profits which the plaintiffs would have made if their contracts had been performed. The SAR chose to make the award under the first head and rejected the other claims under the second. This appeal before me by the 4th defendant was against the assessment awarded of the amount of interest on the purchase price. It is pertinent to note there was no cross-appeal from the plaintiffs and as such the other claims of loss of profits are not in issue.

In this appeal the 4th defendant pointed out that the award of RM205,600 made by the SAR represented the amount of interest the plaintiffs would have earned on the amount of RM2.57m, being the purchase price, if the said sum was kept in fixed deposit at the rate of 8% per annum from July 1990 to July 1991. Counsel of the 4th defendant submitted that the award so made was misconceived in law, *inter alia,* on the ground that there was no evidence of actual damage suffered by the plaintiffs in consequence of the said caveat being lodged by the defendants.

The claim for damages was made under s. 329(1) NLC which reads:

> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

It has been universally accepted that the onus of proof of all elements of a claim for compensation lies on the complainant. In the instant case the ingredients of the claim are these: First, there must have been a caveat lodged, secondly it must have been lodged wrongfully or without reasonable cause and thirdly damage must have been sustained thereby. Unless the plaintiffs herein could prove all these three factors, they could not succeed in their claim. In this appeal from the submissions canvassed before me, I am only called upon to determine whether the plaintiffs had proved the third and last ingredient *ie*, whether there was evidence of damage suffered by the plaintiffs thereby.

In *Cheng Chin Chong v. Shak Heng & Sons Sdn. Bhd.* [1982] 1 MLJ at p. 162, the defendants counter-claimed against the plaintiff for damages under s. 329 NLC for the wrongful entry of a caveat. In this case, the defendants entered into an agreement to sell a piece of land to the plaintiff. Subsequently the plaintiff had purported to rescind the said agreement. The defendants alleged that soon after this, a prospective purchaser was found, willing to purchase the said property for $79,000. On discovery of a caveat on the said property, he refused to go through with the transaction. When the caveat was finally removed, the said purchaser had no more interest to proceed with the deal. According to the defendants, the said property was finally disposed of for $40,000. In other words, the defendants had allegedly suffered a loss of $39,000, due to the belated removal of the caveat. This was one of those cases of usual occurrence where the proprietor attempted to sell the property and had been prevented by reason of the caveat and had actually lost money by it. It should be noted that the money that the defendant allegedly complained to have lost was his own money. For completeness, in that case the trial judge did not buy the story of the defendants for reasons as stated in the judgment and accordingly dismissed the counter-claim.

In *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] 1 MLJ 336, Dato' James Foong J (as he is now) had the occasion to deal with the assessment of damages for the wrongful lodgment of caveat as provided under s. 329 NLC. This is what His Lordship had to say after having stated the facts of the case:

> Basing on the aforesaid events, the defendant (the registered proprietor) now asserts that he has suffered loss by not having the use of the balance of the purchase price which Chieng Chuang (the purchaser) would have given to him if the said caveat was removed. As a result of the plaintiff's wrongful act, he has lost on the interest derived from the balance of the purchase price when the same can be placed by way of fixed deposit in a banking account.

His Lordship continued to say that:

> The usual approach to damages in these type of cases is by determining, in the first instance, whether there is a property value loss. By this, I mean whether there is a decrease in the price of the property after the same is offered for sale subsequent to the caveat being lifted. However, from the facts adduced before this court, I find no evidence of any property value loss. Firstly, the said property is now not offered for sale by the defendant. Secondly, there is no valuation report of whatever nature to indicate the present value of the said property. Therefore, under these circumstances, I find no evidence of any property value loss.

As can be seen, in that case, as in our case, the property was not disposed of. Therefore, there was no transaction and no loss entailed for that part of the case. His Lordship further dealt with the loss of use of the balance of the purchase money in these words:

> Now I shall proceed to examine whether the defendant is entitled to the damages in another form and that is in the loss of the use of the balance of the purchase price the defendant would have received from Chieng Chuang, if not for the said caveat. I would agree with Mr. Arthur Lee that the defendant would have suffered this loss, if Chieng Chuang had exercised their rights to purchase the said property after the lifting of the said caveat and, had paid the balance of the purchase price as agreed in the supplementary contract ... . For this he shall be entitled to bank interest based on funds kept in fixed deposit accounts.

It would appear that in respect of the claim for loss of use of the balance of the purchase price, His Lordship would certainly have given interest, as damages, based on bank rate for the period concerned as loss of use of the money. It should also be noted that the loss claimed there was the loss of use of money that belonged to the defendant, *ie*, it was his own money. In that case, again damages were not given because those transactions were mutually terminated under its respective terms. In the event the defendant did not receive the money and so, there was no loss.

Now we have the case of *Lim Seng Hee & Anor. v. Lee Tuan Wen & Anor.* [1973] 1 MLJ at p 153, a case of breach of contract. In that case, the trial judge found as a fact that the defendants had breached a certain clause of the mining sub-lease, by having delayed mining operation for a certain period of time. Having refused to order cancellation of the sub-lease, His Lordship held that the plaintiffs were clearly entitled to damages for the breach. The learned judge considered that the damage suffered by the plaintiffs was a delay in paying the tribute for the tin ore yet to be won. This is how the learned judge resolved the question of damages payable for the loss of use of the tribute money:

> But while this is probably true, could not the loss be either the loss of use of the amount of tribute for the period (concerned) or merely the reasonable interest due on this sum? In my view the damages could not be the actual loss of tribute or the reasonable interest that could accrue on this sum if paid but the loss of use.

In that case, the learned judge, in the circumstances therein, awarded the plaintiffs $2,000 for damages for breach of contract and costs of the action, but had refused to make award of damages based on interest. Perhaps it might be due to the difficulty in the assessment of the tribute loss. The learned judge had expressed, in dealing with the award, that "... not much evidence was led on their loss. ... Lack of information of the probable amount of tribute for one year and of the use to which the plaintiffs would put the money to does not make for easy assessment". Although that was a case of breach of contract and, therefore not confined to statutory compensation, the plaintiffs' claim therein was similarly in respect of the loss of use of their money. It should also be noted that there is one common thread in all those three cases referred to, *viz*, the money concerned was their own money and it was either a claim of its loss or the loss of its use.

I would like to refer to just a couple of cases from outside our own jurisdiction. In Australia and New Zealand their law, in so far as the issue herein is concerned, *viz*, whether the complainant has thereby suffered any damage, is substantially the same if not identical. So, without further ado, I take two cases for illustrations from the Text from The Federation Press 1995 by Shannon Lindsay on *Caveats Against Dealings*, under quantum. In *Downie v. Kenny* [1986] NSW Cony Rep 255-270, (p. 253), the caveat was lodged by an estate agent to protect his claim to commission, and prejudiced the very sale he was engaged to achieve. His Honour said: "The amount of damages may be effected by the view ... that an agent who acts in opposition to the interests of his principal disentitles himself to any commission". Here again, it clearly showed that the complainant was entitled to deduct the commission to account for the loss flowing from the delay in settlement, thus depriving the complainant from receiving his own money earlier. In another case of *Ceda Nominees Pty Ltd v. Registrar of Titles and Crompton Nominees Pty Ltd* [1982] ANZ Cony Rep 524, (p. 254), the caveat delayed settlement of a contract of sale. The quantum awarded was interest on the mortgage debt to be repaid out of the purchase moneys for the period of the delay in settlement. In other words, the complainant had to pay the mortgagee the additional interest accrued for the period delayed. Again, here the complainant's own money was involved. In all those cases that I have managed to research have one factor in common. The complainants had proved loss of their **own moneys** or loss of use of their **own moneys**.

Bearing that in mind, I now turn to consider the instant case. The award made herein was not for property value loss, as there was no sale involved, but it was the amount of interest that would have accrued on the principal sum of RM2.57m at the rate mentioned. The SAR was clearly of the view that if the said loan facility had not been withdrawn the plaintiffs would have earned interest therefrom. In my opinion the decision of the SAR was erroneous, because the said loan concerned was not the plaintiffs' **own money**. Whether the very fund itself from the bank or the plough back amount, it is the same in principle. If the plaintiffs had made use of it, they would have to pay interest therefor. In other words, by not having to use the money, no interest was payable therefor and there would be no loss incurred. To sustain the claim the complainant must show that either he has thereby incurred a loss of his own money or that he has lost thereby the use of his own money. The fund from MFBB was obviously meant for the plaintiffs' own business endeavour. When the SAR had rejected the plaintiffs' claims for loss of profits from their business, as she did, she should have equally refused this award, as earning interest is also a kind of business. The claim may come under a verity of forms, as can be seen above; for examples, loss of profit due to property value loss, loss of interest from bank or loss of even commission. However, all these losses have their origin from the principal money owned by complainant. I am fully aware of the comment by the famous authoress, Judith E. Sihombing in her commentary on NLC under s. 329, at p. 620. It was only suggested that "the refusal of a prospective chargee to lend money because of the caveat would entitle the plaintiff to damages". Without more, it is of no assistance. In my view, the damages could not be the actual loss of the fund from MFBB and accordingly, the claim for the loss of its use could not be sustained. In the circumstances, such loss of interest and loss of profit are unreasonable. His Lordship in *Mawar Biru Sdn Bhd (supra)* held at p. 341:

> What we are involved in, in this case, is damages and in order to ascertain it there must be real damages as opposed to what might have been the damages.

In the present case if, contrary to my view, the loss of interest was actual loss, as contemplated by s. 329 NLC, I would still hold that the plaintiffs were not entitled to the claim, for their failure to mitigate loss. The plaintiffs could and should have obtained other loans, but did not, even at a higher rate of interest and claimed for the excess interest paid as damages. I find support for my view in the case of *Nelson v. Kimberley Homes Pty. Ltd.* (Supreme Court of New South Wales, 20 April 1988) where Young J, in a similar situation, held:

> The next factor to deal with is the question of mitigation of damage. In an ordinary contract action, a plaintiff is debarred from claiming any part of the damage flowing from the defendant's breach which is due to the plaintiff's failure to take all reasonable steps to mitigate his loss. There is no reason why this principle should not apply to the statutory cause of action under sec. 98 of the Real Property Act, and in my view it does. The judgment of Brinsden J in *Hooke v. Holland, supra,* reinforces this view ... .

I do not wish to conclude without mentioning the case of *Yeoh Tiong Lay & Sons Holdings Sdn Bhd v. Annavi s/o Mookan & Anor And Dekor Panel Emas Sdn Bhd (Intervener)* [1994] 3 CLJ 265, as I do not wish to be misconstrued. In that case it was found by the trial judge that the caveat was calculated to frustrate the sale. His Lordship further held that:

> In view of the foregoing I make an order in terms of Enc. 1 aforesaid with costs. But I wish to add that normally damages are only compensatory. Dekor were equitable owners of this land from the time of completion of their contract. In the affidavits filed, it has been suggested that YTL's acts were motivated by malice. If so, there may well be grounds for granting exemplary or punitive damages against YTL. That issue must be left to be decided when the damages are assessed ... .

In his view the caveat was an abuse of process. He felt that it was a very serious matter to freeze a person's land for years and years. I do share the sentiment as expressed by His Lordship. However, that is not the issue before me on appeal, as I have said earlier in my judgment.

For reasons aforesaid, the SAR's decision is hereby set aside and the appeal is allowed. After having heard submissions on both sides on costs, I made no order as to costs.